SEP 27 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE INTERLAKE STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Stephen A. Sulentich, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 24, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (printed in Appendix B hereto, *infra,* p. 5a) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered June 24, 1958. Rehearing was denied on the fourth day of August, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Whether a master, subject to the Jones Act, can by contract condition the rights given seamen by law upon the passage of a physical examination some five weeks after the seaman has been at work aboard ship. Specifically, can a master, in an action by a seaman for damages and for maintenance and cure, assert that the seaman was not its "employee" within the Act because of alleged failure to disclose certain facts in his medical history at the time of a physical examination given the seaman five weeks after he had been aboard ship performing seaman's duties and two days prior to his injury?

2. Do the teachings of this Court on the power of a trial court to direct a verdict apply only where a verdict is directed by the court against the plaintiff on all charges, or are they equally applicable where the court undertakes to direct a verdict to all but one charge of negligence, notwithstanding evidence of other charges which would justify a verdict?

3. In an action under the Jones Act and for maintenance and cure, can a Court of Appeals, although a proper Notice of Appeal has been filed from both judgments, refuse to review the judgment on the maintenance and cure count on the ground that the errors were not specifically challenged when the errors of the trial court were attacked as common to both judgments?

STATUTES AND TREATY INVOLVED.

The statutory provisions involved are the Jones Act, 38 Stat. 1185, 46 USC, Section 688, and the Federal Employers' Liability Act, 35 Stat. 65, 45 USC, Sections 51, 55. (Appendix A, *infra*, p. 1a)

The treaty involved is the Shipowners' Liability Convention, 54 Stat. 1693 (reprinted, *infra*, Appendix A, p. 3a).

STATEMENT.

Petitioner, Stephen A. Sulentich, sought damages for injury and sickness sustained while a seaman serving as a crew member of the "D. O. Mills", a vessel engaged in constant travel around the Great Lakes.

One count sought damages under the Jones Act, the other sought maintenance and cure. (A. 4.) As an affirmative defense to both counts, Respondent pleaded that Petitioner "was not rightfully or lawfully in the employment of defendant at the time of his alleged accident" because he had misrepresented his prior condition of health during a physical examination, made some weeks after Petitioner had entered on duty as a seaman. (A. 11.)

On the narrow issues submitted to it, the jury returned a general verdict against Petitioner. (A. 401.) The trial judge entered findings of fact and conclusions against Petitioner under the maintenance and cure count. Two separate judgments were entered, one on the general verdict, the other under the maintenance and cure count.

In June of 1953, Petitioner, Stephen A. Sulentich, with no prior experience as a seaman, sought employment at the office of the Lake Carriers' Association in Duluth. (A. 53.) This office served as a hiring hall of seaman for ship owners. (R. 8.)

Subsequently, the Lake Carriers' Association notified him it had a position for him. The Association said nothing about a physical examination. He was sent to the S. S. Mills where he was assigned a bunk and directed to go on watch. Nothing was said of a physical examination when he went aboard ship. (A. 53, 54, 55.)

He signed the ship's articles, which read in part thus:

> "It is mutually agreed that the employment hereunder shall be subject to health examination, which shall be given by a physician furnished by the vessel. In case any member of the crew fails to pass such examination, his term of employment hereunder shall cease." (A. 203, 44.)

From July 11, 1953 until August 17, 1953 he was a coal passer, shoveling ashes in the hole, and assisting the firemen in the fire hole in fueling the fires and blowing the flues. (A. 55.) His duties were varied and arduous. (A. 57, 58.) He worked from 2:00 A.M. to 6:00 P.M., and from 2:00 P.M. to 6:00 P.M. (A. 56.)

He admittedly did this work without difficulty. (A. 58. R. 220, R. 1105-1107.)

During the period from July 11 to August 17, the ship had been in ports on the various Great Lakes at Minnesota, New York, Ohio, Illinois, Wisconsin and Pennsylvania. (R. 83-95.)

On August 17, 1953, while the plaintiff was descending a stairway from the engine room to the crank room, where he was directed to go by his superior, he slipped and injured his back. Subsequently, he was operated upon by a physician of Respondent's choice at the request of Respondent's Safety Director (A. 72, 73, 77), and again at Public Health Hospital in Chicago. Both surgical procedures were to the back. (A. 73, 77.)

On August 15, at Duluth, Minnesota, Petitioner, with others, was given a medical examination. Petitioner passed the examination. (A. 60; plaintiff's Ex. 10.)

At the time of the examination, Petitioner signed his name to two identical forms. (Defendant's Exs. "N" and "O", A. 386-387. These are also referred to as "Defendant's Exhibits "C" and "D".) These are reproduced as Appendix C of this Petition. (See pp. 15a, 16a, *infra.*). Defendant's Exhibit O was blank at the time it was signed. (A. 32.)

Defendant's Exhibit "N" was in the handwriting of the examiner, Dr. Shuman. (A. 294.) On that report by Dr. Shuman, there is nothing written concerning Petitioner's past medical history. The form report signed in blank by Petitioner, Defendant's Exhibit "O" was sent by Dr. Shuman to his employer in Cleveland, Ohio, where some unidentified person made many entries in that blank form, including a past medical history of freedom from back trouble. (A. 329.)[1]

Petitioner, in these proceedings before and at trial admitted a medical record of back pain and that he was the recipient of disability compensation for that condition. (A. 40-43, 52.) He stated that Dr. Shuman did not ask him anything about his back when he examined him. (A. 217.)

Over Petitioner's objections, the Court instructed the jury that if Petitioner had entered upon his appointment

[1] Although Dr. Shuman had no recollection of ever seeing the man, and although the typwritten report, the only one shown him by defendant when he testified, did not refresh his memory, he was allowed to state over specific objections and motion to strike that Petitioner made certain statements concerning his past medical history. (A. 306)

with the understanding that his continued employment was subject to successfully passing a health examination, and that he had fraudulently *concealed or misrepresented* his physicial condition in material respects at the time of such examination, "then plaintiff was not a matter of right defendant's employee . . . and is not entitled to recover . . ." (A. 397).[2]

Succinctly stated, the Court of Appeals held:

1. A master by contract could determine under what circumstances a seaman was its employee within the Jones Act;

2. The decisions of this Court concerning the arena of court and jury did not apply where the trial court

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[2] "If you believe from the preponderance of the evidence (1), that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) **that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability,** or **that he had been and was then receiving veteran's disability benefits based on a rating of 30 per cent disability,** (3) that such misrepresentation or concealment was material, and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above-mentioned elements." (R. 1846, 1897).

refused to submit issues supported by competent evidence, but only where a verdict was directed against the servant on all charges.

3. It would not review a judgment entered on the maintenance and cure count, although a proper notice of appeal therefrom was filed, and although errors alleged were common to both counts of the complaint.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Seventh Circuit to the effect that a master can, through contract, determine the circumstances which bring a seaman within the Act is in direct violation of Section V of the Act and with the decisions of this Court and other courts.

Section V provides:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . ." (45 USCA, Sec. 55).

This Court, in *Philadelphia, Balt. & Wash. R. R.* v. *Schubert*, (1912) 224 U.S. 603, in upholding Section V, pointed out Congress' purpose "was to enlarge the scope of this Section (V) and to make it more comprehensive. . . ." It includes every variety of agreement or arrangement (p. 611).

In *Payne* v. *Daugherty*, (1922; C.A. 8) 283 F. 353, the Court excluded evidence concerning fraudulent misrepresentations as to state of health made at time of obtaining employment "in view of the positive terms of Sections I and V."

So also in *Sea Shipping Co.* v. *Sieracki*, (1946) 328 U.S. 85, 90, 97, it was decided explicitly a servant's status could

not be determined by contract, but that the character of his work was the sole test.

2. Prior to this decision, no court had ever held that fraud committed by a servant subsequent to the entry upon the relationship can dissolve that relationship retroactively. So long as the relationship existed, there was the attendant obligation of the master, and the concurrent rights of the servant.

The Eighth Circuit, in *Payne* v. *Daugherty*, (1922; C.A. 8) 283 F. 353, pointed out that there could be no retroactive dissolution of the relationship. As recently as 1955, the Third Circuit, in *Casso* v. *Penn. R. Co.*, 219 F. 2d 303, 304, decided that if the plaintiff had been put to work before the application containing the misrepresentations had been filled in, there could no defense of fraud.[3]

Here the court proceeded on the theory that if there was fraud, although committed after the man was an employee, it retroactively dissolved his status as an employee, notwithstanding that throughout this period he did seaman's work, and had all the duties and burdens of a seaman.

Illustrative of this principle is the Shipowners' Liability Convention, 54 Stats. 693. It relieves the shipowner from his obligation of maintenance and cure only in case of "sickness and infirmity intentionally concealed when the engagement is entered into" (Article II, Clause 2(c)). (App. *infra*, p. 3a)

3. The decision of the court below on the question of fraud conflicts with the decision of this Court and many other courts holding that fraud of an employee to defeat recovery under the Federal Employers' Liability Act

[3] "There is some doubt whether the plaintiff had not been 'hired' and put to work for the defendant, glass eye and all, before this application was filled in. If this were the situation it is quite clear that the defendant could not be heard to say that it was deceived by anything said by the plaintiff."

must have had a causal relationship to the fact of the accident. (*Minneapolis, St. P. & S. S. M. v. Borum*, 286 U.S. 447.)[1]

There is conflict between the circuits as to what constitutes a "causal relation" between the alleged fraud and the injury.

In *Payne v. Daugherty*, (1922; C.A. 8) 283 F. 353, 354, the 8th Circuit determined the test of causal relationship to be whether the fraud contributed to cause the accident. This is the general rule. On the other hand, *Southern Pacific Co. v. Libbey*, (1952; C.A. 9) 199 F. 2d 341, 348, states that causal relationship means whether the examining doctor would have passed the applicant. In *Talarowski v. Pennsylvania R. R. Co.*, (1955) 135 Fed. Supp. 303, 304 (D.C. Del.), a motion to strike affirmative defense of fraud was denied. Although no causal relationship between the fraud and the injury was pleaded.

This Court has not entertained the question of the circumstances under which fraud can affect a contract of employment since 1932. As is apparent, there is much

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[1] In 136 A.L.R. 1125, where this question is annotated, it is said:

> "Although there is some authority to the contrary, the greater number of cases, many of which involved actions under the Federal Employers' Liability Act and Workmen's Compensation statutes, subscribe to and apply the rule that, where employment is induced by false and fraudulent representations not going to the factum of the contract, the contract is voidable and not void, and therefore the relation of employer and employee exists, even though the misrepresentations may form a just reason for the rescission of the contract; consequently recovery may be had of the employer by the one guilty of the misrepresentation, and who is injured through the negligence of the employer, at least where there is no causal connection between the injury and the misrepresentation."

Then follows a large number of cases in support of this principle.

misunderstanding of how and under what circumstances fraud can affect the status of the servant. This is a question which frequently appears both under the Federal Employers' Liability Act and in Jones Act cases. For a uniform administration and interpretation of these Acts, the Court should grant the writ and clearly enunciate this doctrine. It would aid trial and appellate courts, since it is a matter of common knowledge the employee's status as such is frequently questioned in many of the thousands of cases pending in State and Federal Courts under these important Federal statutes.

4. Again, notwithstanding the reiterated teachings of this Court concerning the function of the judge and the jury, the Court of Appeals has here held that "they (*Rogers* v. *Mo. Pac. R. Co.*, (1957) 352 U.S. 500; *Ferguson* v. *Moore-McCormick Lines, Inc.*, (1957) 352 U.S. 521) deal with the question of whether the trial court was or was not correct in taking the entire case from the jury and directing a verdict for the defendant" (Appendix B, *infra* p. 14a). In other words, it is proper to refuse to grant a jury trial on some issues, albeit there be evidence to support them.

The decisions of this Court require the trial judge to submit to the jury *all jury issues, not one jury issue.*

Here the Court told the jury over objection that the only ground of negligence which could be considered was the condition of the steps.[5]

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[5] "Plaintiff alleges in his complaint that while proceeding down a flight of steps the treads of which were defective, smooth, shiny and worn, he was caused to slip and fall on an accumulation of oily water. **The negligence relied upon is that the treads were permitted to become defective, smooth, shiny or worn or that oil or water or both were negligently permitted to be on the treads of the stairway and caused the plaintiff to fall. These are the only grounds of negligence which you may consider."** (App. p. 395.)

The evidence showed a steep staircase of solid steel plates about three feet wide and eight inches deep, approximately fifty years old, with edges beveled from usage (App. 63). An abrasive material was on the steps, but it varied with the different steps (App. 63, 64). Oil and water were on the stairs, as well as on the deck of the crank room to which they led (App. 67). The stairs were customarily washed off with hose, but no provision was made for drainage. The angle of the stairs depended on how the ship was loaded (R. 1125, 1126). There was a handrail but it did not run the length of the stairway (Plaintiff's Ex. 3, A. 385).

Evidence was offered to show that other ships have grated steps which carry off water. The trial court sustained objection, stating that the only issue was the condition of these steps.[6]

The right to make proof of safer methods was substantive. It was not a mere evidentiary matter.

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[6] "By the Court: . . . I think the views I expressed a few minutes ago, that the mere fact that there may be other different types of treads in use on other boats is inadmissible, and that the evidence to the effect that there were, would tend to confuse the jury and divert their attention from the real issue." (App. p. 262.) This went to the core of the action. **(Bailey v. Central Vermont Ry. Co.**, 319 U.S. 350 (1942); **Boston & M. R. Co. v. Meech**, (1922; CA 1) 156 F. 2d 109; **Poignant v. U. S.**, (1955; CA 2) 225 F. 2d 595.) The opinion of the Court of Appeals does not correctly describe what occurred on the offer of this evidence. (App. 259-265 inc.)

But there is more. The ship was undermanned and hence unseaworthy. There were two oilers at the time of the accident, whereas there were usually three. Usually there were one chief engineer and three assistants, but at the time of this occurrence one was injured and one was sick. (A. 100, 1108.) The importance of these facts is obvious when it is realized the oiler's job was to keep these steps clean (A. 1122, 1125.) Moreover, the engine room crew under whom the oilers worked had to double up. (R. 1108.)

None of these issues was given the jury.

The Court of Appeals declined to review the conduct of the trial court under the maintenance and cure count. The Notice of Appeal specified both judgments. The record on appeal was prepared to present the error under the maintenance and cure count. The principal propositions of law asserted in Petitioner's brief were that plaintiff was in fact and in law an employee of defendant, and that the defense afforded Respondent by the trial court was not a defense in law.[7]

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[7] The first paragraph of "Summary of Argument" read thus:

> "As a matter of law, the affirmative defense that the relationship of master and servant between the defendant and plaintiff did not exist at the time of the accident, is not available to the defendant. . . ." (p. 4, Brief and Argument for Plaintiff.)

Point I-A under the Brief and Argument read thus:

> "The plaintiff had been an employee of defendant for six weeks prior to the accident. He continued thereafter to do the same work, up until his accident. His employment status was unchanged." (p. 6, Brief and Argument for Plaintiff.)

Plaintiff's Reply Brief read thus:

> "II. Plaintiff was Defendant's Employee." (p. 6, Plaintiff's Reply Brief.)

The Court of Appeals thus in effect abdicated its function when it refused to review the judgment on the maintenance and cure count.*

Under Rule 73 (Federal Rules of Civil Procedure, 28 U.S.C.A.) a notice of appeal is the only necessary step for a review of a judgment. Then, too, there is the Congressional mandate that on appeal ". . . the court shall give judgment after an examination of the record without regard to errors and defects which do not affect the substantial rights of the parties." (Title 28 U.S.C.A.; Sec. 2111.)

This forfeiture by the Court of Appeals of Petitioner's right to have the judgment on the maintenance and cure count reviewed is directly in the teeth of recent decisions by this Court. (*Hoiness* v. *United States* (1948), 335 U. S. 297, 300, 301; *State Farm Mutual Automobile Co.* v. *Palmer* (1956), 350 U. S. 944; *United States* v. *Arizona, et al.* (1953), 346 U. S. 907. This refusal is also contrary to decisions by other courts of appeal. In *Zumwalt* v. *Gardner* (1947; C.A. 8), 160 F. 2d 298, the defective brief was almost unintelligible; in *Fishbaugh* v. *Armour & Co.* (1950; C.A. 4), 185 F. 2d 541, the notice of appeal was filed late, and in *Ry. Express Agency* v. *Jefferson* (1957; C.A. 8), 240 F. 2d 189, the notice of appeal specified an order denying a post trial motion rather than the judgment. Yet in each instance review was entertained.

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*As a result of its failure to review the error under the maintenance and cure count, the incongruity of the Court of Appeals' opinion is not apparent. Under the Shipowner's Liability Convention fraud, as a defense to maintenance and cure is, as pointed out supra, confined to fraud committed "at the time of the engagement". Hence, Petitioner was a seaman as to the maintenance and cure count, but not as to the Jones Act count, under this decision.

If defects in the Notice of Appeal, a jurisdictional document, are not grounds for dismissing an appeal *a fortiori*, any hypertechnical defects in Petitioner's brief cannot be grounds for such dismissal.

CONCLUSION.

It is respectfully submitted that because of the far-reaching import of these questions in the day to day trials of master and servant actions, and the conflicts amongst courts, this Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,

JAMES A. DOOLEY
Attorney for Petitioner

APPENDIX A.

JONES ACT

46 USC Sec. 688. *Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

PROVISIONS OF FEDERAL EMPLOYERS LIABILITY ACT

45 USC Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such

commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin, dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * *

45 USC Sec. 55. *Contract, rule, regulation, or device exempting from liability; set-off.*

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

PROVISIONS OF THE SHIPOWNERS' LIABILITY CONVENTION.

54 Stat. 1693

Article 1. 1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

* * * *

Article 2. 1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of—

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the willful act; default, or misbehaviour of the sick, injured, or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

* * * *

Article 12. Nothing in this Convention shall affect any law, award, custom, or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

* * * *

Article 20. The French and English texts of this Convention shall both be authentic, with the following understanding to be made a part of the ratification:

U. S. Understandings

"That the United States Government understands and construes the words 'vessels registered in a territory' appearing in this Convention to include all vessels of the United States as defined under the laws of the United States.

"That the United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.

"That the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which the Government reserves its decision."

APPENDIX B.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12125, SEPTEMBER TERM, 1957—APRIL SESSION 1958

STEPHEN A. SULENTICH,
Plaintiff-Appellant,
v.
THE INTERLAKE STEAMSHIP COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 24, 1958.

Before MAJOR, FINNEGAN and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This appeal follows a judgment on a jury verdict in favor of defendant in an action for damages under the Jones Act, 46 U.S.C.A. § 688.

Plaintiff's complaint is in two counts. Count I, seeking damages for personal injuries under the Jones Act, was tried to a jury and Count II for maintenance and cure was tried to the court.

Although plaintiff's notice of appeal stated that he was appealing from both the judgment on the jury verdict for the defendant on Count I and from the judgment of the court for the defendant on Count II, he asserts in his brief that "[t]he errors relied upon arise out of instructions, rulings on evidence, direction of a verdict on certain charges, and failure of the defendant to maintain its affirmative defense." He deals with these alleged errors only as they affect the jury proceedings on Count I and

limits the contested issues to two in number both of which relate solely to the Jones Act. Hence it follows that the judgment on Count II as tried to the court must be affirmed as it has not been challenged on this appeal.

The defendant, therefore, insists that this appeal should be dismissed because the judgment of the court on Count II is *res judicata* of plaintiff's right to recover under the Jones Act on Count I. We do not agree and we hold that the plaintiff is entitled to have the alleged errors upon which he relies, arising out of the jury proceedings under Count I as stated by him in his brief, considered by this court.

The plaintiff contends that "[t]he defendant failed to sustain the burden of its affirmative defense, which was that the relationship of master and servant did not exist at the time of the accident"; that "[e]ven though the plaintiff may have misrepresented his condition of health in a physical examination taken long after his entry into defendant's employment, such misrepresentation would not *ipso facto* void his contract of employment, and an instruction to that effect is erroneous as withdrawing from the jury an important issue of fact"; that "[s]ince the instruction[1] was erroneous, it was presumptively injurious to plaintiff and furnishes ground for reversal unless the defendant affirmatively shows that it was harm-

[1] If you believe from the preponderance of the evidence (1) that as one of the terms and conditions of his initial employment on July 11, 1953, the plaintiff's employment was subject to a health examination, and in case he failed to pass such examination, his employment should cease; (2) that upon the health examination on August 15, 1953 the plaintiff knowingly misrepresented to or concealed from the examining physician the fact that he had sustained previous injuries and suffered back pain, or that he had been discharged from the military service for physical disability, or that he had been and was then receiving veteran's disability benefits based on a rating of 30% disability; (3) that such misrepresentation or concealment was material; and (4) that such misrepresentation or concealment was relied upon by the defendant, and that plaintiff would not have been permitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then plaintiff was not as a matter of right defendant's employee on August 17, 1953 at the time of his alleged accident, and he is not entitled to recover under the statute under which this action is brought, and you should find the defendant not guilty. You are further instructed that the burden of proof is upon the defendant to prove by the preponderance of the evidence each of the four above mentioned elements.

less"; that "[t]here was no competent evidence on which to base defendant's affirmative defense, or the peremptory instruction;" and that "[t]he court erroneously withdrew from the jury important testimony relating to the employee status of the plaintiff."

These contentions are based primarily upon the false assumption that before the jury could return a verdict in favor of the defendant the defendant had to prove its affirmative defense by a preponderance of the evidence. That is not the law. If the jury found that the plaintiff had failed to prove negligence on the part of the defendant it was warranted in returning a verdict for the defendant even though it also believed that the defendant had failed to sustain the burden of its affirmative defense. That is so elemental that citation of supporting authority would be superfluous.

The plaintiff knowingly failed to disclose his true state of health to defendant's examining physician. He testified as follows:

"Q. And at the time you were taking that examination, Mr. Sulentich, you knew that you had had previous pain in your back before you ever came aboardship?

A. Yes.

Q. And you knew that you had injured your back at Reliance Electric Company?

A. I had a strained condition there, yes, muscle."

* * *

"Q. You knew, however, Mr. Sulentich, that over a long period of time—and I am speaking of your knowledge at the time you were having this physical examination—that you had received medical treatment for your back from the Veterans Administration?

A. Yes, I did.

Q. And you knew furthermore that you were receiving a compensation from the Veterans Administration based on a thirty percent disability?

A. That is right.

Q. And you knew further that you had had attacks of back pain and diathermy and medication for this condition as recently as April, May and June of that year?

A. Well, I had it that year, but I do not know exact dates; treatment, yes."

* * *

"Q. Now, did you disclose any of these conditions to the examining doctor?

A. No, I did not."

The examining physician testified that if the plaintiff had disclosed the true facts concerning his history of back trouble "[h]e would be absolutely unfit to be on board this ship as a seaman", and "if he had given me the correct history as to previous injuries to his back, and would have his employment as a seaman immediately terminated and removed from the ship."

There was evidence introduced that both seamen looking for work and ships needing seamen made request through Lake Carriers Association. It serves as an employment agency and has offices at the principal lake ports. Upon coming aboard a ship the seaman signs "Articles" constituting the contract of employment.

The plaintiff went aboard the defendant's vessel, D. O. Mills, on July 11, 1953 at Two Harbors, Minnesota, and hired out as a coal passer thereon. The Mills, an ore boat, was in almost constant travel around the Great Lakes. Upon coming aboard he signed the Articles, running to July 26, 1953, which contained the following provision:

"5. It is mutually agreed that employment hereunder shall be subject to health examination, which shall be given by a physician furnished by the vessel; in case any member of the crew fails to pass such examination, his term of employment hereunder shall cease."

On July 27, 1953 he signed new Articles, running to August 30, 1953, containing the same quoted provision.

Dr. Castle and Associates examined all seamen employed by the defendant. After the opening of navigation in April such examinations were conducted at Duluth, Minnesota, a port visited by the Steamer Mills about twice a month, by Dr. Schuman of Dr. Castle and Associates. If a crew member was found, upon examination by Dr. Schuman, to have something wrong with him the doctor informed the captain of the ship whereupon the crew member's employment aboardship immediately terminated.

On August 15, 1953 the Mills was in port at Duluth for the first time subsequent to the plaintiff signing aboard on July 1f, 1953. He was then examined by Dr. Schuman. He signed a health examination report at that time certifying immediately over his signature as follows:

> "I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer."

The evidence presented a factual question for the determination of the jury. It was for the jury to decide whether the defendant had sustained its affirmative defense by a preponderance of the evidence.

The plaintiff asserts that the instruction, set out in full in footnote 1, "was a peremptory instruction, directing a verdict for the defendant." A cursory reading of the instruction will immediately demonstrate the fallacy of that contention. It is an instruction mandatory in nature and as such must contain all of the essential elements necessary to warrant a finding under defendants' affirmative defense. This it did.

This instruction clearly informed the jury that if the jury did find from a preponderance of the evidence that the plaintiff knowingly misrepresented to or concealed from the examining physician the facts concerning his previous back injuries; *that such misrepresentation or concealment was material;* that it was relied upon by the defendant; and that plaintiff would not have been per-

mitted to continue to work and remain aboard the vessel if the true state of facts had been disclosed by him, then and only then could the jury find that the plaintiff was not an employee of the defendant on August 17, 1953 and would not be entitled to recover. It must be emphasized that the jury was instructed that the misrepresentation or concealment had to be *material*. This is it had to affect the examining physician's conclusion that he was in good health and should be permitted to work and remain aboard the vessel after August 15, 1953. The court further instructed the jury that the burden of proof was upon the defendant to prove by the preponderance of the evidence *every one* of those elements. We hold that the instruction was a correct statement of the law and was properly given under the evidence in this record.

By giving the instruction:

> "Under the maritime law a seaman who becomes disabled in the service of his ship is entitled to medical care without expense to himself. This obligation falls on the shipowner and exists even though the seaman's employment is not the cause of his becoming disabled and even though the disability occurs without anyone's fault or negligence. Thus, the fact that defendant the Interlake Steamship Company arranged for the hospitalization of plaintiff at Duluth and paid for his surgery should not be considered by you as an admission by defendant of its liability for damages",

the court did not withdraw from the jury important testimony relating to the status of the plaintiff. Counsel for plaintiff made the suggestion to the court below that if it was going to give the instruction "just give the last sentence." If the last sentence was not prejudicial the instruction as a whole was not objectionable. In any event no objection was made to the giving of this instruction in compliance with Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and plaintiff is, therefore, precluded from raising the question now on appeal. *Miller v. New York Central Railroad Company*, 7 Cir., 1956, 239 F. 2d 10, 13.

We have considered with punctiliosity every other contention raised by the plaintiff and find no merit in any of them.

Defendant's Exhibits O and N are written reports of a health examination given the plaintiff by Dr. Schuman aboard the Mills at Duluth, Minnesota on August 15, 1953. The two reports are each signed by both the plaintiff and Dr. Schuman. Dr. Schuman filled out the blanks in Exhibit N in his own handwriting. The blanks in O were later filled in from report N by typewriter. The forms are identical. Both contain a certification by the plaintiff immediately over his signature that he had "disclosed all previous sickness and injuries". He admitted, on cross-examination that he had not.

Both exhibits were admitted in evidence without objection. Plaintiff states, in his original brief, "we specifically objected to its [Exhibit O] introduction * * *; this objection was summarily overruled", but in his reply brief he unequivocally states he did agree to its admission in evidence. In fact in dealing with Defendant's Exhibits O and N the plaintiff asserts in his reply brief "[w]e agreed to their admissibility to demonstrate that Schuman had no answer to the particular questions, and that they were supplied at Cleveland by some third person."

The rule of law, as urged by plaintiff, that a witness may use a *memorandum* prepared by himself to refresh his recollection but when he has testified as to the facts the memorandum is not also admissible in evidence has no application here. Cf. 28 U.S.C.A. § 1732. Defendant's Exhibits N and O were not memoranda but rather written reports prepared by the examining physician and signed by the *plaintiff*. They were admitted in evidence by agreement of the plaintiff.

The trial court did not abuse its discretion in permitting Dr. Schuman to testify as to the questions asked by him of and the answers given by the plaintiff as reflected by the reports signed by himself and the plaintiff. *Lavender* v. *Kurn*, 1946, 327 U.S. 645, 654; *Tatum* v. *U.S.*, D.C. Cir., 1957, 239 F. 2d 129, 132.

The trial court committed no error in ruling as it did as to the witness Eckert. The plaintiff asserts "[o]ur purpose was to show that on many boats the stairs were composed of gratings, from which oil and water would readily drain, so that they would not be so slippery as were the steps on the D. O. Mills."

The plaintiff actually made no such offer to prove, in fact made no offer whatsoever. The trial court asked him what he was offering by the witness Eckert and counsel for the plaintiff announced:

> "Well, I am going to ask the witness and I intended to examine him, your Honor, on the fact that other vessels doing the same kind of work, there were steps which were of a different character than the one involved in the accident, namely steps which were grated."

As to Edward Merchant he was never sworn and placed on the witness stand by the plaintiff. The defendant objected to him as an expert because he was not shown to be so qualified. The plaintiff made no attempt to qualify him and accordingly no question is presented.

Plaintiff insists that a party has the right to comment on the failure of the adverse party to call a material witness shown to be in his control. However, one of the required elements is that he must be a material witness. Plaintiff contends that in *plaintiff's* Exhibit P—he has to mean Defendant's Exhibit because there is no such plaintiff's exhibit—in Chief Engineer Mensen's handwriting is the statement "Lawrence Grabinski saw him after he fell and he was laying on the lower engine room floor." This exhibit was admitted in evidence. We have searched this record and can find no basis for the assertion by the plaintiff that Harvey Mensen could have testified to anything in any manner material to this case.

Plaintiff offered his Exhibit No. 3 a photograph of the stairway involved. It was taken in 1956 after the solid steps with abrasive covers, in use on August 17, 1953, had been removed and the grated surface type steps installed. His offer was as follows:

"May the record show that we are offering it first with the understanding to show the stairway and secondly, for the purpose of showing there is a safer method which could have been employed by this defendant."

The offer itself makes the exhibit inadmissible. Had the plaintiff offered the exhibit for the sole purpose of showing the locus of the accident and the jury were to view it solely to acquaint them therewith that would be one thing, even though the change was a long way from being a slight one, but here the plaintiff offers it for the very purpose of showing the change.

"The rule is universal that evidence offered to show changes made where the injury occurred is not admissible. 31 C.J.S. Evidence §291 p. 1054 n. 2. If, arguendo, it can be assumed that grated steps are safer than solid steps with abrasive covers the photograph was clearly incompetent because sound reason requires that one should be encouraged to improve and not be deterred therefrom by the fear that in so doing the act will be construed as an admission of having been a wrongdoer.

The court instructed the jury that the defendant was liable for injury to an employee "when such injury results in whole or in part from the negligence of any of the officers, agents or employees of the defendant, or by reason of any defect or insufficiency of its vessel or the equipment thereof due to negligence"; "that it was the duty of the defendant to exercise reasonable care to furnish the plaintiff with a reasonably safe place in which to do his work"; and that the only grounds of negligence relied upon by the plaintiff as alleged in his complaint and which the jury could consider was that the treads on the steps "were permitted to become defective, smooth, shiny or worn or that oil or water or both were negligently permitted to be on the treads of the stairway and caused the plaintiff to fall." Under the evidence in this record those instructions were adequate. However, the plaintiff

complains that "[t]here was evidence from which the jury might well conclude that the stairs were not properly inspected, and that plaintiff was not warned of their dangerous condition." Every instruction actually tendered by the plaintiff was given. If there were any tendered by the plaintiff which the court failed to give the plaintiff did not object in compliance with Rule 51 of the Federal Rules of Civil Procedure. He cannot now be heard to complain if the jury was not instructed as fully as he claims it should have been.

The plaintiff cites *Rogers* v. *Missouri Pacific Railroad Co.*, 1957, 352 U.S. 500 and *Ferguson* v. *Moore-McCormick Lines, Inc.*, 1957, 352 U.S. 521 in support of his contention that the court limited plaintiff's recovery to one ground of negligence only. These cases are not even remotely analogous. They deal with the question of whether the trial court was or was not correct in taking the entire case from the jury and directing a verdict for the defendant. The trial court here did not do that. It denied a motion of the defendant made for that purpose and submitted the case to the jury for its determination.

When this entire record is read in context we are convinced that counsel for the plaintiff was denied no rights to which he was legally entitled and has completely failed to demonstrate to this court how he was mistreated in any manner prejudicial to himself or to the plaintiff, his client.

Under the evidence in this record the jury could have found either for the plaintiff or for the defendant. The jury found for the defendant after a fair trial free from prejudicial error. The judgment is, therefore,

AFFIRMED.

APPENDIX C.

DEFENDANT'S EXHIBIT N

The Interlake Steamship Company
HEALTH EXAMINATION

STEAMER D.O. Mills

NAME Stephen A. Sulentich OCCUP. Coal Passer VIA MARINE SERVICE Sta. Tex. Inf. 1-26-18

AGE SEX HEIGHT WEIGHT RACE WHERE BORN

PAST HISTORY: HAVE YOU HAD ANY OF THE FOLLOWING? IF SO, WHEN?

TUBERCULOSIS	BACK PAIN	VENEREAL DISEASE	
ARTHRITIS OR RHEUMATISM	STOMACH TROUBLE	OPERATIONS Tonsils 1924	
FITS OR CONVULSIONS	SPITTING OR PASSING OF BLOOD	INJURIES	
MENTAL OR NERVOUS DISEASE	MALARIA, TYPHOID OR DYSENTERY	OTHER AILMENTS	
HAVING RATS	DIABETES		

HAVE YOU EVER BEEN REJECTED OR DISCHARGED FROM MILITARY SERVICE? WHY?

HAVE YOU EVER RECEIVED OR APPLIED FOR COMPENSATION FROM ANY SOURCE FOR SICKNESS OR ACCIDENT?

CLASSIFIED B

CHECK HERE IF DISQUALIFIED % ACTIVE COMMUNICABLE DISEASE ☐

HEAD	EYES
	Without glasses R 20/20+1 L 20/30+
	With glasses R 20/20+1 L 20/20+1
NOSE	COLOR BLIND
COAT - Tonsils	EARS
HEART	Hearing R 20/20 L 20/20
BLOOD PR. 130/80 PULSE 72	LUNGS
ABDOMEN	
	GENITO URINARY Small Epididymal Cyst Left Testicle
RECTUM HERNIA POTENTIAL HERNIA	
	WASSERMAN
VARICOSE VEINS	SKIN
	VACCIN. SCAR
UPPER EXTREMITIES	LOWER EXTREMITIES Varicose Veins Left Leg

URINALYSIS Sp. Gr. Reac. Alb. Sug.

SCARS, MARKS AND OTHER MEANS OF IDENTIFICATION Scar abdomen 2" L of Left Nipple

PRESENT DISEASES AND DEFECTS FOUND

Varicose Veins - Left Leg - Moderate - Severe; Varicose Veins of Left Testicle - Small Epididymal Cyst Left Testicle; Abdominal Hernia Left Side - Not for Potential Hernia

I hereby certify I have disclosed all previous injuries and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

Stephen A. Sulentich
Signature
(To be signed in examining physician's presence)

DATE 5-15-18

SIGNED [illegible] M.D.
MEDICAL EXAMINER

Def's Exh C (Cont)

SEE REVERSE SIDE

DEFENDANT'S EXHIBIT O

The Interlake Steamship Company

HEALTH EXAMINATION

STEAMER D.O. Mills

NAME Stephen A. Sulentech OCCUP. Coal passer YRS. MARINE SERVICE Since July 11, 1953

AGE	SEX	HEIGHT	WEIGHT	RACE	WHERE BORN

PAST HISTORY: HAVE YOU HAD ANY OF THE FOLLOWING? IF SO, WHEN?

						CLASSIFIED
TUBERCULOSIS	no	BACK PAIN	no	VENEREAL DISEASE	no	
ARTHRITIS OR RHEUMATISM	no	STOMACH TROUBLE	no	OPERATIONS	tonsillectomy & adenoidectomy in childhood	B
FITS OR CONVULSIONS	no	SPITTING OR PASSING OF BLOOD	no	INJURIES	no	
MENTAL OR NERVOUS DISEASE	no	MALARIA, TYPHOID OR DYSENTERY	no	OTHER AILMENTS	no	CHECK HERE IF DISQUALIFIED % ACTIVE COMMUNICABLE DISEASE
RUNNING SORES	no	DIABETES	no			

HAVE YOU BEEN REJECTED OR DISCHARGED FROM MILITARY SERVICE? no WHY?

HAVE YOU EVER RECEIVED OR APPLIED FOR COMPENSATION FROM ANY SOURCE FOR SICKNESS OR ACCIDENT? no

HEAD NECK	negative	EYES	normal
NOSE	normal	Without glasses R. 20/30 L. 20/30	R. 20/30 L. 20/30
TEETH	normal	With glasses R. 20/20-1 L. 20/20	R. 20/20-1 L. 20/20-1
MOUTH	normal	COLOR BLIND	no
THROAT	tonsils removed	EARS	normal
HEART	normal	Hearing R. 36/36 L. 36/36	
BLOOD PR.	100/60 PULSE 88	LUNGS	clear
ABDOMEN	negative		
		GENITO URINARY	small external hemorrhoid
DEFINITE HERNIA	no POTENTIAL HERNIA no		
		WASSERMAN	
NERVOUS SYSTEM	normal	SKIN	normal
		VACCIN. SCAR	yes
UPPER EXTREM.	normal	LOWER EXTREM.	Varicose veins-moderate-right leg.

URINALYSIS Sp. Gr. 1.020 Reac. acid Alb. neg. Sug. neg.

SCARS, BIRTH MARKS OR OTHER MEANS OF IDENTIFICATION: Scar inner aspect of right leg.

PRESENT DISEASES AND DEFECTS FOUND

Varicose veins-right leg-moderate-advise vanous ligation of same.
Small external hemorrhoid—advise regulation of bowels & diet for same.

I hereby certify I have disclosed all previous sickness and injuries and that I am in good health. I also authorize the examining physician to send this report to the employer.

Stephen A. Sulentech
Signature
To be signed in examining physician's presence

DRS. CASTLE RAMSEY CASTLE & ASSOC.

DATE 8-15-53 SIGNED R. Ramsey M.D.
MEDICAL EXAMINER

SEE REVERSE SIDE